

Representative J. Stuart Adams proposes the following substitute bill:

**DIVISION OF REAL ESTATE -
DEFINITIONS AMENDMENTS**

2003 GENERAL SESSION

STATE OF UTAH

Sponsor: John L. Valentine

This act modifies the Securities Division - Real Estate Division section of the Utah Code. The act establishes that a real estate sales agent may be engaged either as an independent contractor or as an employee of a licensed principal real estate broker. The act establishes that the relationship between a sales agent and broker is an independent contractor relationship unless there is clear and convincing evidence that the relationship was intended by the parties to be an employer employee relationship. The act makes technical changes to the renewal of a principal broker's, associate broker's, or sales agent's license. The act makes technical changes to the process of activating an inactive license.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

61-2-2, as last amended by Chapter 106, Laws of Utah 1997

61-2-9, as last amended by Chapter 351, Laws of Utah 1997

ENACTS:

61-2-25, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **61-2-2** is amended to read:

61-2-2. Definitions.

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed



or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office.

(3) "Commission" means the Real Estate Commission established under this chapter.

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3.

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws.

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel.

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity.

(8) "Director" means the director of the Division of Real Estate.

(9) "Division" means the Division of Real Estate.

(10) "Executive director" means the director of the Department of Commerce.

(11) "Main office" means the address which a principal broker designates with the division as his primary brokerage office.

(12) "Principal real estate broker" and "principal broker" means any person:

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration; or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i);

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether his compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise;

(c) who, with the expectation of receiving valuable consideration, manages property

owned by another person or who advertises or otherwise holds himself out to be engaged in property management;

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13) (a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include:

(i) hotel or motel management;

(ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30 consecutive days, and the management activities associated with these rentals; or

(iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

(14) "Real estate" includes leaseholds and business opportunities involving real property.

(15) "Real estate sales agent" and "sales agent" ~~[means]~~ mean any person ~~[employed or engaged as an independent contractor by or on behalf of]~~ affiliated with a licensed principal real estate broker, either as an independent contractor or an employee as provided in Section 61-2-25, to perform for valuable consideration any act set out in Subsection (12).

(16) (a) "Regular salaried employee" means an individual who performs a service for

wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

Section 2. Section **61-2-9** is amended to read:

61-2-9. Examination and license fees -- Renewal of licenses -- Education requirements -- Activation of inactive licenses -- Recertification -- Licenses of firm, partnership, or association -- Miscellaneous fees.

(1) (a) Upon filing an application for a principal broker, associate broker, or sales agent license examination, the applicant shall pay a nonrefundable fee as determined by the commission with the concurrence of the division under Section 63-38-3.2 for admission to the examination.

(b) A principal broker, associate broker, or sales agent applicant shall pay a nonrefundable fee as determined by the commission with the concurrence of the division under Section 63-38-3.2 for issuance of an initial license or license renewal.

(c) Each license issued under this subsection shall be issued for a period of not less than two years as determined by the division with the concurrence of the commission.

(d) (i) Any new sales agent applicant shall submit fingerprint cards in a form acceptable to the division at the time the license application is filed and shall consent to a fingerprint background check by the Utah Bureau of Criminal Identification and the Federal Bureau of Investigation regarding the application.

(ii) The division shall request the Department of Public Safety to complete a Federal Bureau of Investigation criminal background check for each new sales agent applicant through the national criminal history system (NCIC) or any successor system.

(iii) The cost of the background check and the fingerprinting shall be borne by the applicant.

(e) (i) Any new sales agent license issued under this section shall be conditional, pending completion of the criminal background check. If the criminal background check discloses the applicant has failed to accurately disclose a criminal history, the license shall be immediately and automatically revoked.

(ii) Any person whose conditional license has been revoked under Subsection (e)(i) shall be entitled to a post-revocation hearing to challenge the revocation. The hearing shall be conducted in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

(2) (a) A license expires if it is not renewed on or before its expiration date. Effective January 1, 1992, as a condition of renewal, each active licensee shall demonstrate competence by viewing an approved real estate education video program and completing a supplementary workbook, or complete 12 hours of professional education approved by the division and commission within each two-year renewal period. The division with the concurrence of the commission shall certify education which may include, but shall not be limited to, state conventions, home study courses, video courses, and closed circuit television courses. The commission with concurrence of the division may exempt a licensee from this education requirement for a period not to exceed four years upon a finding of reasonable cause and under conditions established by rule.

(b) For a period of 30 days after the expiration date, a license may be reinstated upon payment of a renewal fee and a late fee determined by the commission with the concurrence of the division under Section 63-38-3.2 and upon providing proof acceptable to the division and the commission of the licensee having completed the hours of education or demonstrated competence as required under Subsection (2)(a).

(c) After this 30-day period, and until six months after the expiration date, the license may be reinstated by:

(i) paying a renewal fee and a late fee determined by the commission with the concurrence of the division under Section 63-38-3.2;

(ii) providing to the division proof of satisfactory completion of ~~[the applicable hours of prelicensing education required under Section 61-2-6, which must be completed within six months prior to reinstatement, or providing to the division evidence of successful completion of the respective sales agent or broker licensing examination within six months prior to reinstatement]~~ 12 hours of continuing education, the subject of which shall be determined by

150 the commission by rule; and

151 (iii) providing proof acceptable to the division and the commission of the licensee
152 having completed the hours of education or demonstrated competence as required under
153 Subsection (2)(a).

154 (d) A person who does not renew his license within six months after the expiration date
155 shall be relicensed as prescribed for an original application.

156 (3) As a condition for the activation of an inactive license, a licensee shall supply the
157 division with proof of:

158 (a) successful completion of the respective sales agent or broker licensing examination
159 within six months prior to activation; or

160 (b) the successful completion of the number of hours of continuing education [~~that the~~
161 ~~licensee would have been~~] required [~~to complete~~] under Subsection (2)(a) [~~if the licensee's~~
162 ~~license had been on active status, up to the number of hours required for original licensure.~~
163 ~~Credit shall be given only for education that has been taken within the five years preceding~~
164 ~~activation, except that at least 12 hours of the education must have been taken within 12~~
165 ~~months preceding activation.] within one year before activation. The commission may~~
166 establish by rule the nature or type of continuing education required for reactivation.

167 (4) A principal broker license may be granted to a corporation, partnership, or
168 association if the corporation, partnership, or association has affiliated with it an individual
169 who has qualified as a principal broker under the terms of this chapter, and who serves in the
170 capacity of a principal broker. Application for the license shall be made in accordance with the
171 rules adopted by the division with the concurrence of the commission.

172 (5) The division may charge and collect reasonable fees determined by the commission
173 with the concurrence of the division under Section 63-38-3.2 to cover the costs for:

174 (a) issuance of a new or duplicate license;

175 (b) license histories or certifications;

176 (c) certified copies of official documents, orders, and other papers and transcripts;

177 (d) certifying real estate schools, courses, and instructors, the fees for which shall,
178 notwithstanding Section 13-1-2, be deposited in the Real Estate Education, Research, and
179 Recovery Fund; and

180 (e) other duties required by this chapter.

(6) If a licensee submits or causes to be submitted a check, draft, or other negotiable instrument to the division for payment of fees, and the check, draft, or other negotiable instrument is dishonored, the transaction for which the payment was submitted is void and will be reversed by the division if payment of the applicable fee is not received in full.

(7) The fees under this chapter and the additional license fee for the Real Estate Education, Research, and Recovery Fund under Section 61-2a-4 are in lieu of all other license fees or assessments that might otherwise be imposed or charged by the state or any of its political subdivisions, upon, or as a condition of, the privilege of conducting the business regulated by this chapter, except that a political subdivision within the state may charge a business license fee if the licensee maintains a place of business within the jurisdiction of the political subdivision. Unless otherwise exempt, each licensee under this chapter is subject to all taxes imposed under Title 59, Revenue and Taxation.

Section 3. Section **61-2-25** is enacted to read:

61-2-25. Sales agents -- Affiliated with broker as independent contractors or employees -- Presumption.

A sales agent may be affiliated with a licensed principal real estate broker either as an independent contractor or as an employee. The relationship between sales agent and broker is presumed to be an independent contractor relationship unless there is clear and convincing evidence that the relationship was intended by the parties to be an employer employee relationship.